

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DORIAN E. FLIPPIN,
Petitioner,

v.

JAMES TILTON,
Respondent.

No. C 07-0169 MMC (PR)

**ORDER TO SHOW CAUSE;
GRANTING LEAVE TO PROCEED
IN FORMA PAUPERIS**

(Docket No. 5)

On January 10, 2007, petitioner, a California prisoner proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has applied for leave to proceed in forma pauperis.

BACKGROUND

In 2001, in the Superior Court of Contra Costa County, petitioner was convicted of first degree murder, an enhancement for the use of a firearm was found true, and he was sentenced to a term of 29 years to life in state prison. The California Court of Appeal affirmed. A subsequent petition for a writ of habeas corpus, filed in the Superior Court of Contra Costa County, was denied.

DISCUSSION

This Court may entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall “award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it

1 appears from the application that the applicant or person detained is not entitled thereto.”
2 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the
3 petition are vague or conclusory, palpably incredible, or patently frivolous or false. See
4 Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (quoting Blackledge v. Allison,
5 431 U.S. 63, 75-76 (1977)).

6 The instant petition, when liberally construed, sets forth the following claims: (1) the
7 trial court’s admission of the preliminary hearing testimony of an unavailable witness
8 violated petitioner’s rights to due process and to confrontation; (2) trial counsel provided
9 ineffective assistance in failing to object to the admission of said testimony; (3) the trial
10 court’s rejection of petitioner’s request for a jury instruction on a defense of intoxication
11 violated petitioner’s right to due process; and (4) the trial court violated petitioner’s right to
12 due process by imposing the maximum sentence and restitution amount. Liberally construed,
13 these claims are cognizable.

14 CONCLUSION

15 For the reasons stated above, the Court orders as follows:

16 1. The Clerk of the Court shall serve by certified mail a copy of this order, the
17 amended petition and the petition, along with all attachments thereto, upon respondent and
18 respondent's attorney, the Attorney General for the State of California. The Clerk shall also
19 serve a copy of this order on petitioner.

20 2. Respondent shall file with the Court and serve on petitioner, within 90 days of
21 the date this order is filed, an answer conforming in all respects to Rule 5 of the Rules
22 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be
23 granted based on the claims in the petition. Respondent shall file with the answer and serve
24 on petitioner a copy of all portions of the state trial record that have been transcribed
25 previously and that are relevant to a determination of the issues presented by the amended
26 petition.

27 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
28 the Court and serving it on respondent within 30 days of the date the answer is filed.

1 3. In lieu of an answer, respondent may file, within 60 days of the date this order
2 is filed, a motion to dismiss on procedural grounds, as set forth in the Advisory Committee
3 Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files such a
4 motion, petitioner shall file with the Court and serve on respondent an opposition or
5 statement of non-opposition within 30 days of the date the motion is filed, and respondent
6 shall file with the Court and serve on petitioner a reply within 15 days of the date any
7 opposition is filed.

8 4. Petitioner is reminded that all communications with the Court must be served
9 on respondent by mailing a true copy of the document to respondent's counsel.

10 5. It is petitioner's responsibility to prosecute this case. Petitioner must keep the
11 Court and respondent informed of any change of address and must comply with the Court's
12 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
13 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

14 6. The application to proceed in forma pauperis is GRANTED in light of
15 petitioner's lack of funds.

16 This order terminates Docket No. 5.

17 IT IS SO ORDERED.

18 DATED: May 24, 2007

19 *Maxine M. Chesney*
20 MAXINE M. CHESNEY
21 United States District Judge
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